Supreme Court, U.S.
FILED
06-58 JUL 13 2006
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NO. _____

IN THE

# Supreme Court of the United States

JOSHUA R. MCKEEL
*Petitioner*

v.

THE UNITED STATES
*Respondent*

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Armed Forces

FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I Whether the Convening Authority and the Military Judge Violated the Vicinage Provisions of the Sixth Amendment to the United States Constitution in Allowing the Court-Martial to Proceed in the Northern District of Florida When the Alleged Activity Occurred in the Western District of Texas

II Whether the Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution in Not Dismissing the Charge and Specification When the Petitioner Relied to His Detriment on a Pre-Trial Agreement

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## BASIS FOR JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Armed Forces was entered on April 14, 2006. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Armed Forces is reported as *United States v. McKeel*, 63 M.J. 81 (C.A.A.F. 2006). The decision of the Navy and Marine Corps Court of Criminal Appeals denying relief is unreported.

## PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

U. S. CONST. AMND VI
Article. 6 U.C.M.J. (10 U.S.C. § 806)
Article 15 U.C.M.J. (10 U.S.C. § 815)
Article 36 U.C.M.J. (10 U.S.C. § 836)

Pertinent text of citations are set out in the appendix.

## STATEMENT OF THE CASE

The right to due process is a critical element of our system of justice. Although embodied in the military justice system, it was sadly lacking in the trial of SN Joshua R. McKeel. Caught in the middle of a web of deceit, not of his making, he saw his career destroyed by a trial that trampled the provisions of the Constitution of the United States.

The incident that gave rise to appellant's trial occurred in San Antonio Texas, within the Western District of Texas. He was originally convicted at Captain's Mast for rape and other charges.. The Mast was held at Naval Technical Training Center Detachment, Lackland AFB, San Antonio Texas, within the Western District of Texas. The appellant was induced by Chief Legalman Leiker, the command legal officer, to plead guilty at a Captain's Mast pursuant to Article 15 of the Uniform Code of Military Justice (U.C.M.J.) (10 U.S.C. §815). It was the accused's understanding that if he plead guilty at non judicial punishment he would be discharged administratively within the next few weeks. Petitioner's mother and his step-father also talked with Chief Leiker who assured them that the pre-trial agreement would result in McKeel's non judicial punishment and administrative separation.

In reliance on this pre-trial agreement, the accused plead guilty at Mast before the Commanding Officer, who was a Special Court-Martial convening authority. An administrative separation package, which included the Mast results, was then forwarded to the General Court-Martial convening authority. That convening authority *sua sponte* decided to prefer charges. An arraignment was held subsequent to the referral and trial was set for 16 December at Naval Air Station Pensacola, Florida, within the Northern

District of Florida. The accused obtained civilian counsel. On November 4, 2002, the accused moved for a change of venue to the Western District of Texas. The Military Judge denied the motion to change the situs of the trial to the Western District of Texas. The trial was held at the Naval Air Station Pensacola in the Northen District of Florida.

This matter was tried at Naval Air Station, Pensacola, Florida on 24 September 2002, 4 November 2002, 15 November 2002, 16 December 2002, 17 December 2002, 8 January 2003 and 6 February before a General Court-Martial consisting of Military Judge alone appointed by Chief of Naval Air Training. Appellant was convicted of one specification of Indecent Assault in violation of Art. 134, commensurate with his plea of guilty. The Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence on 26 January 2005. In a 4-1 opinion, the Court of Appeals for the Armed Forces affirmed on April 14, 2006.

## ARGUMENT

I The Convening Authority and the Military Judge Violated the Vicinage Provisions of the Sixth Amendment to the United States Constitution in Allowing the Court-Martial to Proceed in the Northern District of Florida When the Alleged Activity Occurred in the Western District of Texas

The decision of the courts below conflicts with the decisions of this Court and all United States Court of Appeals that have considered the matter. The Court of Appeals for the Armed Forces did not grant oral argument on this issue or allow supplemental briefing. Presumably it relied upon *Chenowith v. Van Arsdall*, 46 C.M.R. 183, 22 USCMA 183 (1973), as did the Navy Marine Corps Court of Appeals for

not granting relief on this issue. *United States v. McKeel*, 2005 WL 165397 (N.M.Ct.Crim.App. 2005). The doctrine articulated in *Chenowith* stands alone for the proposition that a military court-martial can be held outside the State and district of the alleged crime. *See, United States v. Novak,* 443 F.3d 150, 161 (2nd Cir. 2006); *United States v. Perez,* 280 F.3d 318, 327 (3rd Cir. 2002); *United States v. Robinson*, 275 F.3d 371, 378 (4th Cir. 2001); *United States v. Strain,* 396 F.3d 689, 692 (5th Cir. 2005); *United States v. Wood* 364 F.3d 704, 710 (6th Cir. 2004); *United States v. Liang*, 224 F.3d 1057, 1059 (9th Cir. 2000); *United States v. Cryar* 232 F.3d 1318, 1320 (10th Cir. 2000); *United States v. Morgan*, 393 F.2d 192, 195 (D.C. Cir. 2004).

Appellant's trial was onboard the Naval Air Station in Pensacola, Florida within the Northern District of Florida for events that were alleged to have occurred in San Antonio Texas. The appellant timely objected. The Military Judge denied the defense motion and ordered that the trial be held in Florida. A military courthouse at the Lackland Air Force Base was available within the Western District of Texas. Additionally federal courthouses are located within the Western District of Texas including the federal courthouse at San Antonio, Texas. Since this is an issue of constitutional law, the standard of review is *de novo* rather than the abuse of discretion standard applied in the Court of Criminal Appeals. *Ornelas v. United States*, 517 U.S. 690 (1996)

Since colonial times, Americans have resisted government attempts to pack a defendant off to an inconvenient location to hold his trial. In the Declaration of Independence, the Founding Fathers included this complaint against King George as one of the reasons for the severance of ties with the motherland. *In re Cresson*, 897 F.2d 156, 158 (5th Cir. 1990). By Article III of the Constitution, the

federal government was required to try a person in the State where the crime was committed. *Id.* This requirement was strengthened by the adoption of the Sixth Amendment which provides:

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of *the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis added).

It is well settled that a general court-martial is a criminal proceeding. *United States v. Doran*, 7 M.J. 1015, 1017 (N.M.C.M.R 1979). Consequently, the Sixth Amendment attaches. It is also well settled that the Sixth Amendment requires that criminal trials be held in the district or state in which the alleged crime occurs. *United States v. Duncan*, 919 F.2d 981 (5th Cir. 1990); *United States v. Cores*, 356 U.S. 405, 407 (1958). The Navy-Marine Corps Court of Criminal Appeals erroneously relied upon *Ex Parte Quirin*, 317 U.S. 1, 39 (1942) which is inapplicable, to find that Article III and the Sixth Amendment did not attach *Quirin* applies only to military tribunals and not to courts-martial.

Thirty years ago, the Court of Military Appeals addressed this issue in the military context. *Chenowith v. Van Arsdall, supra. Chenowith* is not consistent with the

precedents of this Court which has held that absent military necessity the protections of the Bill of Rights apply to military members. *Burns v. Wilson*, 346 U.S. 137 (1953). Military courts subsequent to *Chenowith* have addressed the issue of the Bill of Rights application to the members of the military service and have held that the Bill of Rights applies to persons in the military. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976). When the rights of such persons must be conditioned to meet certain overriding demands of discipline and duty, the burden of showing that military conditions require a different rule than that prevailing in the civilian community is on the party arguing for different rule. *See, also, United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979). *Id.* Thus *Chenowith* must be limited to its facts.

*Chenowith* involved sabotage onboard the aircraft carrier *Ranger*. At the time of the court-martial, the ship was deployed to a combat zone off the coast of Vietnam. The government requested a change of venue to the Philippines to be near the situs of the crime and the witnesses. Here the appellant wishes to accomplish the same result as the government in *Chenowith*. The situs of the alleged crimes was in Texas. The vast majority of the witnesses and all of the physical evidence were also located there. The convening authority was based in Corpus Christi, Texas. Holding the court-martial in Texas would have assisted the defense.

In *Chenowith*, the actual situs of the crime was the *Ranger*, not the Naval Station San Francisco. The fact that the *Ranger* moved across the Pacific Ocean was irrelevant as to its status of a crime scene. Accordingly, moving the trial to the Philippines near the present location of the *Ranger* was consistent with the petitioner's Sixth Amendment rights. Although the court rejected the constitutional justification for

the move, it embraced the underlying reasons for it.

As discussed above, the military courts must follow the dictates of the Supreme Court. The *Chenowith* holding is in opposition to Supreme Court precedent and cannot be applied to the instant case. The Supreme Court has explained that trials must be held near the scene of the crime to "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964).

In the instant case, the trial was several hundred miles away from the situs of the alleged offense. The government had no operational reason for holding the trial in Florida. Witnesses and evidence were in Texas. There were both military and federal court rooms within the State and District and in close proximity to the scene of the alleged crime.

Early in this century, Mr. Justice Brown emphasized why trials need to be held close to the situs of the purported offense. In his opinion in *Hyde v. Shine*, 199 U.S. 62, 78 (1905), Mr. Justice Brown noted:

> To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.

Justice Brown's analysis not only makes good sense, it supports the principle of fundamental fairness. This is the cornerstone of our standards of due process and it represents

the law of the land. Justice Reed, in his opinion in *Johnston v. United States*, 351 U.S. 21 (1956), noted that the situs of a trial must be fixed at the vicinage of the crime and that any variation for the convenience of the prosecution (or the petitioner) cannot be justified. *Id.* at 220-21. *Reed Enterprises v. Clark*, 278 F.Supp. 372 (D. D.C. 1968). *aff'd* 88 S.Ct .1196 (1968).

The right to venue in the vicinage of the alleged offense is a fundamental right in a criminal proceeding. *United States v. Miller*, 111 F.3d 747, 754 (10th Cir. 1997); *United States v. Stratton*, 649 F.2d 1066, 1077 (5th Cir. 1981). Accordingly, actual prejudice need not be shown. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Thus the convictions for the charge and specification must be set aside. This Court should align the military system with the rest of the federal criminal system and require the armed forces to implement the vicinage provisions of the Sixth Amendment.

II The Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution in Not Dismissing the Charge and Specification When the Petitioner Relied to His Detriment on a Pre-Trial Agreement

The decision of the court below conflicts with the holdings of the other United States Courts of Appeal that have addressed the standard for equitable immunity, or *de facto* immunity as it is called in the military. Specifically, the standard articulated by the Court of Appeals for the Armed Forces is in contrast to that articulated by the Eleventh Circuit in *Rowe v. Griffin*, 676 F.2d 524 (11th Cir.1982). The *Rowe* court found that equitable immunity requires enforcement of an agreement when (1) an agreement

was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government. *Rowe*, 676 F.2d at 527-28. This reasoning has been adopted by other circuits. *United States v. McHan* 101 F.3d 1027, 1034 (4th Cir. 1996). *See also, United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir.1991) and *United States v. Paiva*, 294 F.Supp. 742, 747 (D.D.C.1969) which articulated a similar standard.

In contrast, the court below adds another element, detrimental reliance to the *Rowe* standard. As Judge Erdmann wisely pointed out in his dissent, the concept of detrimental reliance is not a proper element in a *de facto* immunity analysis. *United States v. McKeel*, 63 M.J. 81, 85 (C.A.A.F. 2006), (Erdmann, J. dissenting). Consequently, this Court must act, not only to settle this important aspect of the law, but also to reconcile the differences between the Circuits. Under the *Rowe* analysis, McKeel equitable immunity would have required that the charges be dismissed. Since the Court below did not articulate any uniquely military circumstance that would give rise to the addition of the detrimental reliance element, and no such uniquely military concern is evident, there is no reason to treat military members differently than other citizens. Judge Erdmann's dissent, which reflects the majority view among courts of appeal that have ruled on this doctrine, is the better view and should be adopted by this Court.

The Manual for Courts-Martial, (hereinafter MCM) recognizes the concept of *de facto* or equitable immunity. In

the discussion to R.C.M.[1] 704(c), the drafters note the following:

> Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. *Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether.* Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred. (Emphasis added).

Thus a *de facto* agreement arises when a person with apparent authority to make a promise does so and the other person performs in accordance with that promise. There is no requirement in the R.C.M. for the additional element of detrimental reliance. The Manual for Courts-Martial and the Rules for Court-Martial are promulgated by the President pursuant to Art. 36 of the U.C.M.J. (10 U.S.C. § 836). The Court of Appeals of the Armed Forces and the other military courts are required to enforce the provisions of the MCM as promulgated by the President under Art. 36. *United States v.*

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[1] Rule for Court-Martial

*Scheffer*, 523 U.S. 303, (1998).

Military jurisprudence also requires that when a promise is made in the context of a pre-trial agreement it must be kept. As an example in *Cooke v. Orser*, 12 M.J. 335 (CMA 1982) the courts found no right to try by court-martial when the SJA had promised no prosecution in response to an agreement to cooperate. Perhaps even more on point is *United States v. Brown*, 13 M.J. 253 (C.M.A. 1982) in which an informal agreement was upheld as a matter of due process, even though there was no intentional breach of it. In that case, the breach was made when the SJA became ill and the purpose of his promise was frustrated. Since there was no fault on the part of the accused, the court held the agreement was enforceable.

The court below's predecessor court examined the concept of equitable immunity in *Samples v Vest*, 38 M.J. 482 (C.M.A. 1994). The *Samples* court found that " an accused honestly and reasonably believes that an official has promised him transactional immunity and that official has the lawful authority to do so, then the promise is the functional equivalent of a grant of immunity." *Samples*, 38 M.J. 486. The question here was not whether the official has lawful authority but whether the accused believes that he did. *Id.* That finding is in consonance with the other circuits but was abandoned by the court below in *McKeel*.

In the instant case there is no question that an agreement was made. The accused was told by the command Legal Officer[2] that he would not be court-martialed and that

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[2] Prior to 1 October 2001, LT Spencer of NTTC Corry Station was the SJA for Lackland. On 1 October 2001,

he would be administratively separated should he agree to plead guilty at Mast. He plead guilty in based on the word of Chief Legalman Leiker that he would not be prosecuted criminally. The subsequent prosecution was directly related to the same offenses - in fact they were the same offense. Thus the transaction met the accepted three part *Rowe* test for equitable immunity.

The Military Judge in his essential findings found that the testimony of Mrs. Huff, the accused and the stipulation as to the testimony of Mr. Gene Huff supported the fact that Leiker had made a promise to forego court-martial if the accused accepted Mast and waived his administrative discharge board. He further accepted the notes made by Mr. Huff as factual. He also stated that the appellant's mother and step-father believed Chief Leiker had the authority to enter into a pre-trial agreement. Additionally, the appellant believed that Chief Leiker had that authority. Basically, the Military Judge accepted as true the defense version of the facts and was critical of the means by which this agreement was secured and its effect. *McKeel*, 63 M.J. at 85 (Erdmann, J. dissenting).

The fact that Leiker did not have the authority to enter into a pre-trial agreement is of no moment. The question is whether he had the apparent authority. Apparent authority is recognized in the jurisprudence and in the discussion to R.C.M. 704. *United States v. Jones* 52 M.J. 60, 65 (C.A.A.F 1999). In *Jones* it was the Staff Judge Advocate

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however, NTTC Lackand Det stood up as its own command and was no longer under the auspices of the Corry Station command or its SJA. LNC Leiker, the command legal officer began performing SJA type duties.

who made the promise. Here LNC Leiker, as command Legal Officer, was acting in the same capacity and with the same mantle of command and apparent authority as an SJA. Judge Erdmann noted that McKeel, as a young seaman attending his initial training, saw the Chief as the "face of the naval military justice system." *McKeel*, 63 M.J. at 87-88, (Erdmann, J dissenting). He found that it would be unreasonable for someone in McKeel's position to question Chief Leiker's authority. *Id.* Without question, McKeel and his parents believed that Chief Leiker had the authority to negotiate the pre-trial agreement. Additionally, the agreement was ratified by the Commanding Officer, who was the Special Court-Martial convening authority. *McKeel*, 63 M.J. at 85 (Erdmann, J. dissenting).

In, *United States v. Kimble*, 33 M.J. 284 (CMA 1991) for example, a Special Court-Martial convening authority promised the accused that if he participated in a civilian treatment program he would not be court-martialed. The *Kimble* court held that such a promise triggered *de facto* immunity. *Id.* 289-90. In the instant case, the accused gave up much more. He plead guilty at Mast, subjecting himself to punishment. He also agreed to an administrative separation with a less than honorable discharge in return for the promise to not court-martial him. In making this bargain, the appellant waived virtually all of his veterans benefits and exposed himself to significant prejudice in civilian life. The Commanding Officer, who was the Special Court-Martial convening authority, held the Mast and formerly ordered the administrative separation. She then forwarded the administrative separation package to the general court-martial convening authority. The appellant was as good as his word and fulfilled his contractual responsibilities. As the *Kimble* court said, it is now time for the government to comply. *Id.* at 290.

Military courts have also found that apparent authority does not have to reside in a commissioned officer. In *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986), the Court of Military Appeals held that an inducement from the accused's Leading Chief Petty Officer was sufficient.

In *Churnovic*, a Chief Petty Officer was assigned to investigate a note that referenced the presence of hashish on the ship. The Chief Petty Officer believed that the accused had some connection with hashish allegedly on the ship, but assured him that if he turned the contraband in to authorities he would not be prosecuted. *Id* at 403-04. The accused was later interviewed by NIS (now NCIS) and admitted culpability. The *Churnovic*, court found that the Chief Petty Officer had an interest in eradicating drug use and that he was in contact with the command structure. *Id* at 405. The *Churnovic* court also properly found that the matter was binding.

While the charges in the instant case were more serious than those in *Churnovic*, the seriousness of the charges, in themselves, should not be a determining factor in ascertaining whether or not *de facto* immunity applied. McKeel was charged and convicted of indecent assault. Such an offense is chargeable and has in fact been routinely bought before Special Courts-Martial. *See, e.g. United States v. Graham*, 56 M.J. 266 (C.A.A.F 2002); *United States v. Lowe*, 56 M.J. 914 (N.M.C.C.A. 2002); *United States v. Manns*, 54 M.J. 164 (C.A.A.F. 2000); *United States v. Nadel*, 48 M.J. 485 (C.A.A.F 1998).

The actions of LNC Leiker and his Commanding Officer convinced the accused that he had entered into a pre-trial agreement. It is presumed that the Commanding Officer and the Legal Officer communicated with each other as

required by Art. 6(b) of the U.C.M.J. (10 U.S.C. § 806(b). Certainly they have a duty to consult and communicate. *Cooke, supra*, 12 M.J. at 339. The actions of the Special Court-Martial convening authority and her Legal Officer triggered a *defacto*/equitable grant of immunity from prosecution. The actions of the Commanding Officer in administering the Mast and later forwarding the administrative discharge board ratified any decisions made by her Legal Officer. Looking through the eyes of an unsophisticated E-2 from Tennessee, with the benefit of a high school education and no formal legal training, it is readily apparent that he would believe that he had entered into a binding agreement. LNC Leiker was under a duty to consult with his Commanding Officer and the Staff Judge Advocate of the General Court-Martial convening authority. Art. 6(b). So the burden should not be on an E-2 to check with a senior officer to ascertain whether he had consulted with his immediate superior in the chain of command regarding the agreement. An E-2, especially one assigned to a training command, would make such an inquiry at his peril.

Even if the majority in *McKeel* was correct and the other Circuit Courts of Appeal wrong on the issue of detrimental reliance, the facts support the proposition that McKeel relied to his detriment on the agreement. It is well settled that under military law, "the Government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony." *United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994). In the instant case, the record shows the opposite. The decision of the convening authority to prefer and refer court-martial charges was made only upon the testimony of the accused at Mast. Military law requires the Military Judge to inquire as to whether the preponderance of the evidence supports the proposition that the

prosecutorial decision was untainted by the immunized testimony. *Id.* No such inquiry was conducted. In reality, based on the convening authority's admitted reliance on the immunized testimony, no such inquiry was required. The Military Judge here erred by not finding based on the existing record, that the prosecutorial decision was made based solely on the immunized testimony.

Even if the convening authority were to claim that they have withdrawn from the agreement, such a withdrawal would not act to vitiate the agreement or the immunity. In *United States v. Villareal*, 47 M.J. 57 (N.M.C.C.A. 1997), the court held that an accused was not entitled to specific performance of a PTA from which the convening authority had timely withdrawn. The glaring exception to this was in the case of detrimental reliance. In the instant case, the accused has relied to his detriment on the false assurances of the convening authority. He plead guilty at Mast. He made inculpatory statements. He agreed to an administrative separation. These actions were sufficient to constitute detrimental reliance within the scope of *Shepardson v. Roberts*, 14 M.J. 354 CMA 1983).

It is incumbent upon the government to act fairly with its citizens and especially with those who would risk their lives in its defense. As Justice Black once said:

> Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square

corners in dealing with their government.

*St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)

Another court put it more simply:

> To say to these appellants, "The joke is on you. You shouldn't have trusted us," is hardly worthy of our great government

*Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

The Military Judge's error was based on the outdated holdings of two court decisions, *United States v. Thompson*, 11 U.S.C.M.A. 252 (1960) and *United States v. Joseph*, 11 M.J. 333 (C.M.A. 1981). Neither case represents the state of the current law. Both of these decisions relied upon previous versions of the Manual for Courts-Martial that did not include the apparent authority provisions of the current Manual. *See*, *United States v. Wagner*, 35 M.J. 721, 726 (A.F.C.M.R. 1992). Additionally, in *Joseph*, the court reached their decision because the issue was not raised at trial. 11 M.J. at 334. In addition, unlike the instant case, the accused in *Joseph* did not allege that the government breached their promise to them or that he relied on those promises to his detriment. *Id* at 335. Both issues have been fairly raised in the court below.

Here fundamental fairness and the law requires that the agreement be enforced. Thus the conviction for the charge and specification must be set aside.

## CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Armed Forces.

Respectfully Submitted,

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*United States Court of Appeals for the Armed Forces*
*Washington, D. C. 20442-001*

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| UNITED STATES, | ) | USCA Misc. Dkt. No. 05-0363/NA |
| | ) | |
| Appellee | ) | Crim. App. Dkt. No. 200202328 |
| | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| JOSHUA R. MCKEEL | ) | |
| | ) | |
| Appellant | ) | |

Argued Dec. 6, 2005.
Decided April 14, 2006.

EFFRON, J., delivered the opinion of the Court, in which GIERKE, C.J., and CRAWFORD and BAKER, JJ., joined. ERDMANN, J., filed a dissenting opinion.

For Appellant: John B. Wells (argued); *Lieutenant Richard H. McWilliams,* JAGC, USNR.
For Appellee: *Captain Roger E. Mattioli,* USMC (argued); *Commander C.N. Purnell,* JAGC, USN (on brief); *Colonel W.K. Lietzau,* USMC, and *Captain Glen R. Hines,* USMC.
Judge EFFRON delivered the opinion of the Court.
Appellant was charged with rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2000). At a general court-martial composed of a military judge sitting alone, Appellant was convicted, pursuant to his pleas, of the lesser included offense of indecent assault, in

violation of Article 134, UCMJ, 10 U.S.C. § 934 (2000). The adjudged sentence included a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of fifteen months for a period of fifteen months from the date the sentence was adjudged. The United States Navy-Marine Corps Court of Criminal Appeals affirmed in an unpublished opinion. *United States v. McKeel,* No. NMCCA 200202328, 2005 CCA LEXIS 16, 2005 WL 165397 (N.M.Ct.Crim.App. Jan. 26, 2005).

On Appellant's petition, we granted review of the following issue:

WHETHER THE MILITARY JUDGE ERRED IN NOT DISMISSING THE CHARGE AND SPECIFICATION BECAUSE THE APPELLANT RELIED TO HIS DETRIMENT ON A PRETRIAL AGREEMENT.

For the reasons discussed below, we affirm.

## I. BACKGROUND

Appellant contends that he entered into a pretrial agreement with a special court-martial convening authority (SPCMCA) before entering into the pretrial agreement with the general court-martial convening authority (GCMCA) in the present case. Prior to entering his pleas, Appellant moved to dismiss the charges on the grounds that his earlier agreement with the SPCMCA included a grant of immunity. According to Appellant, the SPCMCA agreed that there would be no court-martial if Appellant: (1) agreed to accept nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815 (2000), for the charged misconduct, and (2) agreed to waive his right to

contest his separation from the military at an administrative discharge board. The motion was denied. The present appeal concerns the authority to grant immunity and related considerations concerning the administration of nonjudicial punishment.

## A. THE AUTHORITY TO GRANT IMMUNITY

Military law recognizes two types of immunity that may be granted to a military accused. Transactional immunity exempts an accused "from trial by court-martial for one or more offenses under the code." Rule for Courts-Martial (R.C.M.) 704(a)(1). Testimonial immunity protects an accused against "the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial." R.C.M. 704(a)(2). Testimonial immunity-in contrast to transactional immunity-does not bar prosecution of the person who has received the grant of immunity. *See* R.C.M. 704(a) Discussion.

The President, in the *Manual for Courts-Martial,* has restricted the authority to grant immunity. Within the armed forces, only an officer authorized to serve as a GCMCA may grant immunity. R.C.M. 704(c). The President has not constrained the GCMCA from using a subordinate to convey an offer of immunity to the designated person when the GCMCA has approved a specific grant of immunity. The GCMCA, however, may not delegate the authority to grant immunity. R.C.M. 704(c)(3).

A purported grant of immunity by an official not empowered by the President to make such a grant is not valid. At trial, the military judge may provide relief tailored to the circumstances

if: (1) a promise of immunity was made; (2) the accused reasonably believed that a person with apparent authority to do so made the promise; and (3) the accused relied upon the promise to his or her detriment. *See, e.g., Shepardson v. Roberts,* 14 M.J. 354, 358 (C.M.A.1983); *United States v. Caliendo,* 13 C.M.A. 405, 409, 32 C.M.R. 405, 409 (1962); *United States v. Thompson,* 11 C.M.A. 252, 255, 29 C.M.R. 68, 711 (1960); *see* R.C.M. 704(c) Discussion; *Manual for Courts-Martial, United States,* Analysis of the Rules for Courts-Martial app. 21 at A21-38 (2005 ed.).

When the promise of immunity has been made by an officer having apparent but not actual authority, the remedy addresses the extent of detrimental reliance. *See Caliendo,* 13 C.M.A. at 409, 32 C.M.R. at 409; *Thompson,* 11 C.M.A. at 255, 29 C.M.R. at 71. Normally, detrimental reliance upon apparent authority can be remedied by measures short of a bar to prosecution, such as exclusion of evidence obtained directly or indirectly from the servicemember's reliance or precluding nonevidentiary uses of immunized statements in the decision whether to prosecute. *See, United States v. Jones,* 52 M.J. 60, 65 (C.A.A.F.1999); *United States v. Olivero,* 39 M.J. 246, 249 (C.A.A.F.1994). If the military judge has provided an adequate remedy at trial, no further relief is warranted on appeal. *See Shepardson,* 14 M.J. at 358. In unique circumstances, our Court has concluded that the only appropriate remedy is to dismiss the charges. *See, e.g., United States v. Kimble,* 33 M.J. 284, 289-92 (C.M.A.1991); *Cooke v. Orser,* 12 M.J. 335, 342-43 (C.M.A.1982).

## B. NONJUDICIAL PUNISHMENT

The UCMJ also preserves the authority of a senior commander to ensure accountability for misconduct by limiting the effect of nonjudicial punishment imposed by subordinates under

Article 15, UCMJ. *See United States v. Joseph,* 11 M.J. 333, 334-35 (C.M.A.1981). If a subordinate commander imposes nonjudicial punishment for an offense that is not "minor," *see* Article 15(b), UCMJ, the senior commander is not precluded from referring the matter for trial by court-martial. *See* Article 15(f), UCMJ; R.C.M. 907(b)(2)(D)(iv); *United States v. Fretwell,* 11 C.M.A. 377, 379, 29 C.M.R. 193, 195 (1960). When an accused receives a court-martial sentence for the same conduct that was punished at an Article 15 proceeding, the accused has the opportunity to request a sentence credit under *United States v. Pierce,* 27 M.J. 367 (C.M.A.1989). *See United States v. Bracey,* 56 M.J. 387, 388-89 (C.A.A.F.2002); *United States v. Gammons,* 51 M.J. 169, 180 (C.A.A.F.1999).

## II. DISPOSITION OF THE CHARGES AGAINST APPELLANT

### A. NONJUDICIAL PUNISHMENT

During an interview with an agent of the Air Force Office of Special Investigations (OSI), Appellant admitted to engaging in sexual activity, including sexual intercourse, with an intoxicated female shipmate. Appellant also admitted that he did not believe that the shipmate was able to consent. The OSI agent recorded Appellant's admissions in contemporaneous, handwritten notes and in a subsequent summary of the interview.

The OSI investigation was forwarded to the SPCMCA in Appellant's chain of command. The chief petty officer (CPO) who served as the ship's senior enlisted person responsible for military justice matters, conveyed the following offer to Appellant and his parents: If Appellant accepted nonjudicial punishment under Article 15 for this misconduct, and if he

waived his right to an administrative discharge board, there would be no court-martial and Appellant would be discharged administratively from the military.

Appellant accepted the offer. The SPCMCA held a proceeding pursuant to Article 15, UCMJ, at which Appellant pleaded guilty to various charges, including rape. The nonjudicial punishment ordered by the SPCMCA included forty-five days of restriction, forty-five days of extra duty, forfeiture of one-half pay per month for two months, and reduction in grade from E-3 to E-2.

### B. REFERRAL TO TRIAL BY GENERAL COURT-MARTIAL

Subsequently, Appellant was processed for administrative discharge. Consistent with the agreement, the SPCMCA forwarded Appellant's administrative discharge packet to the GCMCA, who also served as the administrative discharge authority. The GCMCA, who had no previous knowledge of the charges against Appellant, declined to approve the discharge, and ordered an investigation into the charges under Article 32, UCMJ, 10 U.S.C. § 832 (2000). After the investigation was completed, the GCMCA referred a charge of rape-for which Appellant had received nonjudicial punishment-to trial by general court-martial.

## III. DISCUSSION

Appellant contends that he received a grant of immunity on the rape charge as part of his agreement with the SPCMCA. He further contends that the GCMCA erred in referring that charge to a general court-martial, and that the military judge erred in denying his motion at trial to dismiss the charge.

As noted in Section I.A., *supra,* when a servicemember seeks dismissal of charges based upon a promise of immunity, the servicemember must demonstrate that the promise was made by an officer authorized to grant immunity. Appellant recognized at trial, and has acknowledged on appeal, that the claimed grant of immunity was not issued by a general court-martial convening authority.

For purposes of this appeal, we shall assume, without deciding, that the CPO made the offer with the approval of a court-martial convening authority, the SPCMCA, and that Appellant reasonably relied upon an offer made with apparent authority. Because the claimed grant of immunity in the present case is based on apparent rather than actual authority, Appellant must demonstrate detrimental reliance and that remedial steps were inadequate. *See supra* Section I.A.

We note that the military judge ruled that statements made by Appellant at the nonjudicial punishment proceeding could not be admitted into evidence against him at the court-martial. The prosecution also agreed at trial that Appellant's decision to waive an administrative discharge board, and matters related to his administrative separation, could not be used against him at trial. In addition, the prosecution agreed that Appellant would be entitled to full sentencing credit under *Pierce* for the punishment received at the nonjudicial punishment proceeding.

Well before Appellant entered into discussions with the CPO, he was interviewed by an agent of the OSI in which he set forth the details of his misconduct. Appellant's admissions, recounted in the OSI report, provided ample grounds for the GCMCA to reject the proposed administrative discharge and order a pretrial investigation under Article 32, UCMJ. Trial counsel asserted that the Government learned nothing from Appellant's statements during the nonjudicial punishment

proceeding that it did not already know from his admissions to the OSI agent, and an affidavit of the CPO who made the offer to Appellant supports this assertion. Appellant has not identified any statement made during the nonjudicial punishment proceedings or in the administrative discharge packet that added any matter of significance to the information that would have been presented to the GCMCA in the course of making the disposition decision, absent the promise communicated to Appellant by the CPO. Under these circumstances, we conclude that the Government has shown that the decision to prosecute was untainted by the Article 15 proceeding and the administrative discharge packet. *See Olivero,* 39 M.J. at 249.

In summary, the record reflects that appropriate remedial actions were taken at trial, and that Appellant has not demonstrated detrimental reliance. Appellant has not identified any unique circumstances that would warrant dismissal of the charges.

## IV. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

ERDMANN, Judge (dissenting):

The majority concludes that McKeel is not entitled to de facto transactional immunity because it finds that appropriate remedial actions have been taken and that McKeel has not demonstrated detrimental reliance. As I conclude that the concept of detrimental reliance is not a proper element in a de facto immunity analysis, I would conclude that McKeel had been granted de facto transactional immunity, that he was entitled to enforcement of that promise, and that the Government was barred from bringing a subsequent

prosecution against him. I therefore respectfully dissent.

The facts in this case are straightforward. While attending an initial training school, McKeel was suspected of the rape and sexual assault of a female recruit. During a subsequent interview with the Office of Special Investigations (OSI), McKeel made a number of incriminating statements. Sometime after the OSI interview, Chief Petty Officer (CPO) Leiker, the chief legal officer, told McKeel and his parents that if he accepted nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815 (2000), and waived an administrative discharge board, he would not be court-martialed. McKeel accepted nonjudicial punishment under Article 15 and waived an administrative discharge board. McKeel was not provided the opportunity to consult with a judge advocate prior to accepting the offer. *See* Dep't of the Navy, *Manual of the Judge Advocate General* § 0109a.(1). All of these actions were approved by the special court-martial convening authority (SPCMCA). However, when McKeel's discharge package was received by the general court-martial convening authority (GCMCA), that officer declined to approve the administrative discharge and initiated steps resulting in a charge for rape being referred to a general court-martial.

McKeel filed a motion to dismiss on the grounds that he had received de facto immunity from CPO Leiker. Following an Article 39(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 839(a) (2000), session, the military judge denied the motion to dismiss on the ground that under Rule for Courts-Martial (R.C.M.) 704, immunity is within the sole discretion of the GCMCA. McKeel and his parents testified that they believed CPO Leiker had the authority to inform McKeel that if he accepted nonjudicial punishment under Article 15 and waived his right to an administrative discharge board he would not be court-martialed. That testimony is

uncontroverted. Although the military judge stated that he was not convinced that CPO Leiker had apparent authority, he found that McKeel's mother believed that CPO Leiker had the authority. FN1 At the general court-martial, McKeel entered a plea of guilty to indecent assault and was sentenced to five years of confinement, reduction to E-1, forfeiture of all pay and allowances and a dishonorable discharge. Pursuant to a pretrial agreement the convening authority suspended that portion of the sentence in excess of fifteen months for a period of fifteen months.

> FN1. The military judge did not make any specific findings regarding McKeel or his stepfather. It was apparent from the record that since he believed that only the general court-martial convening authority (GCMCA) could grant immunity, that line of testimony was not relevant.

The majority opinion recognizes the concept of de facto immunity and creates a test to determine when a military judge may fashion appropriate relief for promises of immunity made by a person without actual authority: "(1) a promise of immunity was made; (2) the accused reasonably believed that a person with apparent authority to do so made the promise; and (3) the accused relied upon the promise to his or her detriment." While the concept of detrimental reliance has sometimes been referenced in this court's immunity jurisprudence, I believe that the concept is misplaced in the de facto immunity context. Consequently, a review of immunity in military justice is warranted.

*United States v. Thompson,* 11 C.M.A. 252, 255, 32 C.M.R. 68, 71 (1960), and *United States v. Caliendo,* 13 C.M.A. 405, 409, 32 C.M.R. 405, 409 (1962), were decided under para. 148*e* of the *Manual for Courts-Martial, United States* (1951 ed.). FN2

In those cases individuals who did not have general court-martial convening authority informed suspects that no action would be taken against them if they either returned stolen property or testified about a theft. FN3 This court held in both cases that there was no valid grant of immunity because the individuals purporting to make the grant did not have the requisite authority. In both cases, however, the court held that if the defendants had incriminated themselves in reliance on the defective promises, incriminating evidence or statements would not be admissible. Thus, while recognizing de jure immunity and enforcing the voluntariness of pretrial statements, the court did not raise the issue of de facto immunity and made no conclusions in that regard.

> FN2. That provision dealt with the interest or bias of a witness and authorized a GCMCA to grant testimonial immunity.

> FN3. The other case relied upon by the majority in this analysis, *Shepardson v. Roberts,* 14 M.J. 354, 358 (C.M.A.1983), has nothing to do with immunity but rather is a case in which the convening authority withdrew from a pretrial agreement and the issue in the case was whether the withdrawal was proper. The court held that a convening authority was bound to the agreement if the accused had relied on the agreement to his detriment.

This court issued a splintered decision in *Cooke v. Orser,* 12 M.J. 335 (C.M.A.1982), under para. 68*h* of the *Manual for Courts-Martial, United States* (1969 rev. ed.) (1969 *MCM*). FN4 In that case the appellant argued that the staff judge advocate to the commander of the Strategic Air Command promised him immunity from prosecution if he provided a statement and took a polygraph test. The lead opinion found

that the promises made by the staff judge advocate led Cooke to believe that if he cooperated he would not be court-martialed by military authorities. *Cooke,* 12 M.J. at 342. Finding that an accused "need not gamble on the integrity of prosecutorial authorities in the military justice system," the lead opinion held that Cooke's due process rights had been violated. *Id.* at 343.

> FN4. Cooke was charged with espionage for providing information and materials to the Soviet Union. The three-member court produced three separate opinions. Judge Fletcher wrote the lead opinion, Chief Judge Everett concurred and Judge Cook dissented. Paragraph 68*h* authorized a GCMCA to grant transactional immunity.

Chief Judge Everett's concurring opinion relied upon the immunity provisions of paragraph 68*h* of the 1969 *MCM.* He concluded that while the staff judge advocate did not have authority to grant immunity, the subsequent actions of the GCMCA ratified his grant of immunity. *Id.* at 354 (Everett, C.J., concurring). The dissent of Judge Cook found that only the GCMCA had the power to grant immunity and it was not enough that the accused may have reasonably believed that he had been granted immunity. *Id.* at 365 (Cook, J., dissenting). While the lead opinion hinted at the concept of de facto immunity, it was not specifically raised or discussed in the opinion.

Rule for Courts-Martial 704, *Manual for Courts-Martial, United States* (1984 ed.) (1984 *MCM*), recognized both transactional and testimonial immunity and provided that immunity could only be granted by a GCMCA. FN5 The 1984 *MCM,* in the discussion to R.C.M. 704(c), recognized for the first time the concept of de facto immunity. Case law too began to explicitly recognize the concept. In *United States v.*

*Churnovic,* 22 M.J. 401, 402-03 (C.M.A.1986), a chief petty officer informed a crew member that he would not be punished if he gave information about or turned in drugs. The court stated: "if he was promised immunity from prosecution for possessing hashish in return for revealing its location and if he provided the requested information, he is entitled to the benefit of that promise." *Id.* at 407. In *United States v. Kimble,* 33 M.J. 284, 289-90 (C.M.A.1991), the court held that a promise made by a SPCMCA not to prosecute if Kimble completed a treatment program for child abusers constituted a grant of transactional immunity. Both of these cases recognized the concept of de facto immunity where a promise not to prosecute was made by someone with apparent authority.

> FN5. Only minor changes, none pertinent to this discussion, have been made to Rule for Courts-Martial 704 since the adoption of the 1984 *MCM.*

In *Cunningham v. Gilevich,* 36 M.J. 94, 100-01 (C.M.A.1992), the court recognized that it had applied some type of de facto immunity since *Cooke,* but found that the petitioners in that case had not established that the officer who offered the immunity had done so with apparent authority. FN6 In *Samples v. Vest,* 38 M.J. 482, 486-87 (C.M.A.1994) the court again recognized the concept of de facto immunity, but held it was not applicable where the appellant had not shown that he had been misled.

> FN6. Concluding that there was no transactional immunity, the court went on to hold that under the "unlawful influence" provision of Article 31(d), the Government had the burden of establishing that any evidence used to prosecute the petitioner was independent of testimony derived from the immunity offer. *Cunningham v. Gilevich,* 36 M.J. 94, 102

(C.M.A.1992).

From these cases it is clear that de facto immunity is a well-established principle of military law despite the clear language of R.C.M. 704(c). FN7 What is not so clear is the relationship to "detrimental reliance" and how de facto immunity is applied to transactional immunity as opposed to testimonial immunity-two very different concepts.

> FN7. Only a GCMCA authority may grant immunity, and may do so only in accordance with this rule.

Rule for Courts-Martial 704(a) recognizes two types of immunity: transactional immunity, which bars future prosecutions, and testimonial immunity, which allows future prosecutions but bars the use of immunized testimony at the trial. De facto immunity has different applications to these different types of immunity. If there is a finding of de facto transactional immunity, then there can be no prosecution, as the appellant is entitled to have the promise of transactional immunity enforced. *Samples,* 38 M.J. at 487. The issue of detrimental reliance and the requirement for independent evidence to support a subsequent prosecution do not arise because a grant of transactional immunity means that there will be no subsequent prosecution.

Where there is a finding of de facto testimonial immunity, the Government can proceed with a prosecution but has the burden of establishing that all evidence was obtained independently from the immunized testimony. *Kastigar v. United States,* 406 U.S. 441, 461-62, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). If, however, there is a finding that there is no de facto testimonial immunity, the court will go on to examine whether the statements or evidence derived from the alleged immunity process are otherwise admissible. *Cunningham,* 36 M.J. at

101-02 (unlawful inducements and influences in obtaining statements may nonetheless give rise to Article 31, UCMJ, 10 U.S.C. § 831 (2000), issues).

I agree with the first two criteria suggested by the majority for determining whether de facto immunity exists: an accused must honestly and reasonably believe that (1) a promise of immunity was made; and (2) the promise was made by a person with apparent authority to do so. *Jones*, 52 M.J. at 65; *Samples*, 38 M.J. at 487. In this case there is no dispute that CPO Leiker promised McKeel immunity if he accepted nonjudicial punishment under Article 15 and waived his right to an administrative discharge board-both of which he did. McKeel was a young seaman attending his initial training. Chief Petty Officer Leiker was the chief legal officer and was the face of the naval military justice system to both McKeel and his parents. The undisputed testimony discloses that CPO Leiker held himself out to have the authority to promise that McKeel would not be prosecuted if he undertook the required action. A reasonable observer would conclude that a new E-2 would not question the authority of a chief petty officer who is also the highest ranking legal officer in his unit. The military judge erred in concluding that CPO Leiker did not have the apparent authority to grant immunity. That finding is not supported by the evidence, is directly contrary to the undisputed testimony, and conflicts with other findings by the military judge.

I disagree with the majority that detrimental reliance has any place in the de facto immunity analysis. Detrimental reliance in this context appears to have migrated from R.C.M. 705(d)(4)(B), which lists the conditions under which a convening authority can withdraw from a pretrial agreement. Among these conditions is a withdrawal before an accused begins performance of promises contained in the agreement.

This condition came from *Shepardson v. Roberts,* which held that a convening authority will be bound to a pretrial agreement if the accused has detrimentally relied on the agreement. 14 M.J. 354, 358 (C.M.A.1983).

Rule for Courts-Martial 705 is not applicable to this case, nor will it be applicable in most cases involving a grant of de facto immunity. There was no pretrial agreement between McKeel and CPO Leiker or McKeel and the SPCMCA because McKeel was not being referred for a court-martial. FN8. *See* R.C.M. 705(b) (concerning the nature of a pretrial agreement). There was a promise from CPO Leiker to McKeel that he would not be prosecuted if he accepted nonjudicial punishment under Article 15 and waived an administrative discharge board, but that does not rise to the level of a pretrial agreement. Rather, upon fulfillment of the two conditions imposed by CPO Leiker's promise, McKeel was entitled to enforcement of this de facto transactional immunity. And where the promise constitutes de facto transactional immunity it is not adequate simply to ensure immunized statements are not used in a subsequent prosecution, the very existence of which violates the terms of the immunity.

> FN8. As noted in *United States v. Jones,* 52 M.J. 60, 65 (C.A.A.F.1999), "A de facto grant of immunity arises when there is an after-the-fact determination based on a promise by a person with apparent authority to make it that the individual will not be prosecuted." With an "after-the-fact" determination, rarely, if ever, will a formal pretrial agreement be involved.

I conclude that CPO Leiker, an officer with apparent authority, promised McKeel transactional immunity if he accepted nonjudicial punishment under Article 15 and waived his right to an administrative discharge board. McKeel did both and

now it is time for the Government to honor its promise. The importance in enforcing such grants of immunity was emphasized by Chief Judge Everett in *Cooke* as follows:

> where, as here, the stakes are high, a suspect who has been asked for information-and his lawyer-must know that a promise of immunity which is given by a staff judge advocate possessing all the indicia of apparent authority and is reasonably relied on by the suspect will thereafter be judicially enforced. Otherwise, lips will remain sealed when it is vital to national security that they be unlocked. Although in this case an officer who may well have been a spy and traitor will escape military prosecution, it still is in the national interest that the promise of immunity be enforced.

*Cooke,* 12 M.J. at 358 (Everett, C.J., concurring) (footnotes omitted).

Those involved in government understand the numerous governmental departments and levels of authority; but to the average citizen, the government is the government and the left hand should not be able to take away what the right hand has properly granted. FN9 I would therefore reverse the findings and sentence and dismiss the charges.

> FN9. "I join Judge Fletcher in concluding that the Government cannot improve its legal position because its left hand did not know what its right hand was doing." *Cooke v. Orser,* 12 M.J. 335, 354 (C.M.A.1982) (Everett, C.J., concurring).

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For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (WELLS, Esq.)
Counsel; for Appellee (MATTIOLI)

**UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

JOSHUA R. MCKEEL NMCCA No. 200202328

V.

United States
Respondents

Sentence adjudged 6 Feb. 2003.
Decided 26 Jan. 2005.

Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Air Training, Corpus Christi, TX.

JOHN B. WELLS, Civilian Appellate Defense Counsel.

Maj CHARLES R. ZELNIS, USMC, Appellate Defense Counsel.
Capt GLEN R. HINES, USMC, Appellate Government Counsel.

Before C.A. PRICE, E.B. HEALEY, and R.C. HARRIS.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT

HEALEY, Judge.
***1** Pursuant to his pleas, the appellant was convicted of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. A general court-martial consisting of a military judge sitting alone sentenced the appellant to 5 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, with the exception of the dishonorable discharge, ordered it executed. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 15 months for 15 months from the date of trial.

We have carefully considered the record of trial, the appellant's three assignments of error, FN1 the Government's response, and the appellant's reply. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

> FN1. I. The Convening Authority and the Military Judge erred in allowing the court-martial to proceed in the Northern District of Florida.
>
> II. The military judge erred in not dismissing the charge

and specification because the appellant relied to his detriment on a pre-trial agreement.

III. The actions of the special court-martial convening authority and his legal officer constituted unlawful influence in violation of Article 31.

Change of Venue

In the appellant's first assignment of error, he asserts the military judge erred by allowing the court to proceed in a district other than where the offense was committed. We disagree.

The appellant's offense occurred at Lackland Air Force Base, Texas, where the appellant and the victim were attending "A" School. However, at the time of the trial, neither was stationed in Texas. Many of the witnesses had been transferred from Texas to other parts of the world. At trial, the Government counsel stated all witnesses would be made available and the appellant conceded he was not aware of any problems with getting witnesses to Pensacola, Florida the site of the trial. The military judge, counsel, and potential members were from Pensacola. Therefore, it was economical for the Government to try the court-martial in Pensacola.

The appellant does not claim he was prejudiced because the trial was held at a location other than where the offense was committed. His sole basis for requesting a change of situs was the Sixth Amendment to the Constitution of the United States that says, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...."

As to the appellant's assertion that the Sixth Amendment to the Constitution of the United States, requires court-martial cases be tried in the district where the incident occurred, the Supreme Court of the United States has held that the requirements of Article III of the Constitution and similar requirements of the Sixth Amendment are not applicable to military tribunals. *Ex Parte Quirin,* 317 U.S. 1, 39 (1942). Our superior court has also concluded that federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment. *Chenoweth,* 46 C.M.R. 183, 186, 1973 WL 14477 (C.M.A.1973)(citing *United States v. Knudson,* 16 C.M.R. 161, 1954 WL 2439 (C.M.A.1954)); *United States v. Fisher,* 15 C.M.R. 152, 1954 WL 2268 (C.M.A.1954).

Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial establish the location at which a court-martial may, or must be conducted. *Chenoweth,* 46 C.M.R. at 186. Rule for Courts-Martial 504(e), Manual for Courts-Martial, United States (2002 ed.), says, "The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided." "However, once he has referred charges to a court-martial, any motion for a change of venue, or of the situs of the trial, is properly addressed solely to the military judge as an interlocutory matter, and his ruling thereon 'is final and constitutes the ruling of the court.' " *Chenoweth,* 46 C.M.R. at 186 (quoting Art. 51(b), UCMJ 10 USC § 851(b)). The military judges' ruling on a motion for a change of venue is reviewed for abuse of discretion. *United States v. Thomas,* 43 M.J. 550, 595-96 (N.M.Ct.Crim.App.1995) (quoting Art. 51(b), UCMJ, 10 USC § 851(b)). Based on the circumstances in this case, where the appellant was provided with equal access to witnesses, we do not find an abuse of discretion in the denial of the request for a change of venue. Therefore, we decline to grant relief.

In the appellant's second assignment of error, he contends that the military judge erred by not dismissing the charge and specification because the appellant relied to his detriment on a pretrial agreement. We disagree.

The Air Force Office of Special Investigations (OSI) interviewed the appellant on 3 October 2001. During that interview the appellant admitted that he digitally penetrated and had sexual intercourse with a shipmate who he did not believe had the ability to consent. The appellant's admissions were recorded in notes made by the OSI agent contemporaneous to the interview and in a summary of the interview. Appellate Exhibit XXXI at 270-76. Sometime subsequent to the OSI interview, the unit's legalman chief petty officer (CPO) advised the appellant that if he accepted Article 15, UCMJ, nonjudicial punishment (NJP) for the rape and then waived his right to an administrative discharge board, there would be no court-martial. Record at 204-07. On 26 April 2002, nearly eight months after the appellant's statement to the OSI agent, the appellant plead guilty at an NJP to rape and other charges. Prosecution Exhibit 2. He was processed for an administrative discharge and he waived his board. Record at 205. However, rather than discharge the appellant, the general court-martial convening authority (GCMCA) referred the appellant to a general court-martial for the same rape for which he had received NJP. Record 191-207; Charge Sheet.

At trial the appellant moved to dismiss the charge and specification alleging he had received, "equitable immunity" from the legalman CPO who induced him to cooperate, accept NJP, and waive his administrative discharge in exchange for not being sent to a courts-martial. The appellant asserts the actions of the CPO were in essence a pretrial agreement that

triggered a *defacto* immunity barring further prosecution. Again, we disagree.

The appellant stated he believed that the CPO had the authority to tell him what he told him. Record at 205. The appellant does not aver that the CPO had received any assurances that an administrative discharge would be approved by the officer exercising general courts-martial (OEGCM) jurisdiction. *Id.* at 198. To the contrary, the GCMCA did not approve the discharge, but had a charge of rape preferred and sent to an Article 32, UCMJ, investigation. Investigating Officer's Report of 12 Aug 2002. Other than accepting NJP and waiving his administrative discharge board, the appellant does not assert that the Government imposed any other requirements on him. The appellant does not assert and there is no evidence that the Government intended to use at trial any evidence obtained from the NJP proceedings. In fact, the Government agreed the NJP proceeding would only be used to factor in "*Pierce* credit," if convicted. Record at 215; *see United States v. Pierce,* 27 M.J. 367 (C.M.A.1989).

The decision to grant immunity is a matter generally within the sole discretion of the appropriate GCMCA. R.C.M. 704(e). Under some circumstances a promise of immunity by someone other than a GCMCA may bar prosecution altogether. R.C.M. 704(c), Discussion. Our superior court has held a promise of a staff judge advocate, a special court-martial convening authority, or a representative may result in *de facto* immunity. *United States v. Kimble,* 33 M.J. 284 (C.M.A.1991); *United States v. Churnovic,* 22 M.J. 401 (C.M.A.1986); *Cooke v. Orser,* 12 M.J. 335 (C.M.A.1982). "A *de facto* grant of immunity arises when there is an after-the-fact determination based on a promise by a person with apparent authority to make it that the individual will not be prosecuted." *United States v. Jones,* 52 M.J. 60, 65 (C.A.A.F.1999).

A factor to be considered when *de facto* immunity is raised is whether there has been detrimental reliance on the part of the appellant. "Where an official who has either expressed or implied authorization of the [GCMCA] promises immunity, 'the Government must abide by an agreement on which an accused has reasonably relied to his detriment.' " *Kimble,* 33 M.J. at 292 (quoting *Churnovic,* 22 M.J. at 405). "[D]etrimental reliance may include any action taken by an accused in reliance on a pretrial agreement which makes it significantly more difficult for him to contest his guilt on a plea of not guilty." *Shepardson v. Roberts,* 14 M.J. 354, 358 (C.M.A.1983).

*De facto* immunity, commonly called "equitable immunity," triggers the remedial action of the exclusionary rule and permits enforcement of the agreement. *United States v. Olivero,* 39 M.J. 246, 249 (C.M.A.1994) (concluding the "Government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony"). Where there is *de facto* immunity, our superior court has held that any evidence derived from such *de facto* immunity will not be admissible unless there is an independent source for the evidence or charges. *Oliver,* 39 M.J. at 249.

The appellant seeks to avail himself of the shield of detrimental reliance because he received NJP, waived his administrative board rights, and made admissions during his NJP. There is nothing to demonstrate any of these actions on the part of the appellant made it more difficult for him to contest his guilt. This is particularly true in view of, (1) his prior comprehensive admissions made the day of the offense, and (2) the Government's concession to exclude from evidence any information from the NJP.

We also look at whether the admissions of the appellant at NJP

factored into the prosecutorial decision to forward the charges to a general courts-martial. Based upon the nature and extent of the inculpatory admissions made by the appellant to the OSI agent and the OSI investigation, there was ample evidence for the GCMCA to refer a charge of rape to general courts-martial. We are not persuaded that any admissions made by the appellant during NJP, even if forwarded to the GCMCA, played a part in the decision to prosecute. Appellate Exhibit XXXI.

Use of administrative alternatives, open plea bargaining, and resolution of appropriate cases at lower levels is important and in fact, critical to ensure proper and timely disposition of infractions in the military system. The convening authority is in the best position to decide whether to enter into a pretrial agreement, whether to grant immunity in exchange for testimony, and whether there should be any limitations on the findings and the sentence in an individual's case. *Jones,* 52 M.J. at 66. As articulated by our sister service court, "[i]f immunity were to be conferred upon this appellant, almost any statement of nonprosecutorial intent by almost any person with an investigators badge could bind the government's hands and preclude a prosecution." *United States v. Zupkofska,* 34 M.J. 537, 540 (A.F.C.M.R.1991). We conclude the appellant did not suffer detrimental reliance. Therefore, we decline to grant relief.

Unlawful Command Influence

In his third assignment of error, the appellant raises for the first time on appeal, unlawful command influence on the part of the special court-martial convening authority and his legal officer. The appellant avers that the decision to prefer charges was defective because it was based upon statements induced by the legal officer that violated Article 31, UCMJ.

At the appellate level, the appellant "must show (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness." *United States v. Richter,* 51 M.J. 213, 224 (C.A.A.F.1999)(citing *United States v. Biagase,* 50 M.J. 143, 150 (C.A.A.F.1999)). However, defects in preferring and forwarding charges are forfeited if not raised at trial, unless the failure to raise the issue is itself the result of unlawful command influence. *Id.* (citing *United States v. Hamilton,* 41 M.J. 32, 37 (C.M.A.1994)). In this case, the evidence surrounding the accusatorial stage of the trial was available at trial. The appellant does not aver that the alleged unlawful command influence prevented him from raising the issue at trial. Therefore, we hold the issue of unlawful command influence was forfeited, and decline to grant relief.

Absence of the Appellant at Trial and Failure to Authenticate

Although not raised as error, we note that the appellant was not present during the 15 November 2002 session of the trial. Record 102-07. We also note that the record for the 15 November 2002 session was not authenticated.

Sessions were held 24 September 2002, 4 November 2002, 15 November 2002, 16 November 2002, 17 December 2002, 8 January 2003, and 6 February 2003. During the 15 November session the defense brought a motion to suppress or order depositions. The judge granted the defense requested depositions.

R.C.M. 804(a) says, "[T]he accused shall be present at ... every stage of the trial," but then sets out numerous exceptions. The right to be present is so fundamental, and the Government's interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present

only for good cause, and only after the military judge explains to the accused the right and the consequences of foregoing it, and secures the appellant's personal consent to proceeding without the accused. R.C.M. 804, Discussion. In that regard, the following brief colloquy occurs:

> MJ: Okay. Now, for the purpose of this limited hearing, has your client waived his presence?
>
> CDC: He has, and we're also waiving Captain Weisman's presence, and Lieutenant Wallace's presence.

Record at 102. During the numerous sessions, both prior to and after the 15 November session, there is neither objection nor affirmation on the part of the appellant regarding his absence from this session.

R.C.M. 1104 implemented Article 54, UCMJ. *United States v. Ayers,* 54 M.J. 85, 92 (C.A.A.F.2000). R.C.M. 1104(a)(2)(A) requires that a record of trial be authenticated by the military judge who presided over that portion of the trial. The purpose of authentication is to ensure the verity of the record. *Ayers,* 54 M.J. at 92 (citing *United States v. Galloway,* 9 C.M.R. 63, 65, 1953 WL 2606 (C.M.A.1953) and *United States v. Myers,* 2 M.J. 979, 980 (A.C.M.R.1976)).

We conclude, under the circumstances of this case, to include, (1) the very limited duration of the session, (2) the absence of objection by the appellant at subsequent sessions, (3) the ruling favorable to the appellant during the session, and (4) the lack of any post trial objection that the appellant suffered no prejudice from the military judge's failure to authenticate pages or from the appellant's absence at trial. Therefore, we decline to grant relief. Notwithstanding our conclusion in this case, greater

attention to the authentication process and MCM guidance concerning procedures to be used in the absence of the appellant's presence at trial, should be rendered by those responsible for the fairness and the accuracy of the proceedings.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority. We further order that Appellate Exhibits XXXVII through XL and L be sealed.

PRICE, Senior Judge, and HARRIS, Judge, concur.

## TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

**U. S. Constitution, Amendment VI. Jury trials for crimes, and procedural rights.**
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**10 U.S.C. § 806 Article. 6 U.C.M.J. Judge advocates and legal officers**
(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by

direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.
(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.
(c) No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.
(d)(1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.
(2) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under > section 973(b)(2)(B) of this title.

**10 U.S.C. § 815, Article 15 U.C.M.J. Commanding officer's non-judicial punishment**
(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and

amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a), any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial--

(1) upon officers of his command--

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command--

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command--
(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;
(B) correctional custody for not more than seven consecutive days;
(C) forfeiture of not more than seven days' pay;
(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;
(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;
(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;
(G) detention of not more than 14 days' pay;
(H) if imposed by an officer of the grade of major or lieutenant commander, or above--
(i) the punishment authorized under clause A;
(ii) correctional custody for not more than 30 consecutive days;
(iii) forfeiture of not more than one-half of one month's pay per month for two months;
(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;
(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;
(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;
(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, "correctional custody" is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b)(2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating--

(1) arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;
(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or
(4) extra duties to restriction;
the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.
(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of--
(1) arrest in quarters for more than seven days;
(2) correctional custody for more than seven days;
(3) forfeiture of more than seven days' pay;
(4) reduction of one or more pay grades from the fourth or a higher pay grade;
(5) extra duties for more than 14 days;
(6) restriction for more than 14 days; or
(7) detention of more than 14 days' pay;
the authority who is to act on the appeal shall refer the case to a judge advocate or a lawyer of the Department of

Homeland Security for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).
(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.
(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing.

**10 U.S.C. § 836, Article 36 U.C.M.J. President may prescribe rules**

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
(b) All rules and regulations made under this article shall be uniform insofar as practicable.

FILED
OCT 5 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-58

# In the Supreme Court of the United States

JOSHUA R. McKEEL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner's court-martial in Florida for an offense that occurred in Texas violated the Sixth Amendment's requirement that criminal prosecutions must be tried in the State and district where the crime was committed.

2. Whether petitioner was entitled to transactional immunity based on a promise made by a person who clearly lacked authority to grant immunity.

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# In the Supreme Court of the United States

No. 06-58

JOSHUA R. McKEEL, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 63 M.J. 81. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 18-28) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 14, 2006. The petition for a writ of certiorari was filed on July 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, but should have been invoked under 28 U.S.C. 1259(3).

### STATEMENT

Following a court-martial by a military judge, petitioner pleaded guilty to indecent assault, in violation of Article 134, Uniform Code of Military Justice (UCMJ or

Code), 10 U.S.C. 934. He was sentenced to a dishonorable discharge, five years of confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority ordered the sentence executed except for the dishonorable discharge, and suspended all confinement in excess of 15 months for 15 months from the date of trial. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. Pet. App. 18-28. The Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1-17.

1. The military recognizes two forms of immunity: transactional and testimonial immunity. Transaction immunity bars a trial by court-martial for an offense under the Code. Testimonial immunity bars the use of a person's statements, and any information directly or indirectly derived from such statements, at a later court-martial. Courts-Martial Rule (C.M.R.) 704(a). "Only a general court-martial convening authority may grant immunity and may do so only in accordance with this rule." C.M.R. 704(c). The general court-martial convening authority (GCMCA) may not delegate his power to grant immunity. *Id.* R. 704(c)(3).

The UCMJ authorizes a commanding officer to impose nonjudicial punishment (NJP) for offenses under the Code. 10 U.S.C. 815. An NJP imposed on a defendant will not bar a court-martial trial for a serious crime growing out of the same conduct, but the court-martial will consider the NJP in determining punishment if the defendant is found guilty at the court-martial. UCMJ, Article 15(f).

2. On September 3, 2001, petitioner, a sailor in the United States Navy, entered the room of a female shipmate who was lying on her bed intoxicated. Petitioner sexually fondled the woman and penetrated her vagina

with his fingers. At the time of the incident, petitioner and the victim were stationed at Lackland Air Force Base in San Antonio, Texas. Gov't C.A. Br. 2.

On October 3, 2001, an Air Force Office of Special Investigations (OSI) agent obtained petitioner's written admission that he had sexual intercourse with the victim and that she did not have the ability to consent. Pet. App. 5. The chief petty officer (CPO) advised petitioner that if petitioner accepted nonjudicial punishment for the rape and agreed to waive his right to an administrative discharge board, he would not be court-martialed. *Id.* at 5-6. Petitioner accepted that offer and pleaded guilty to rape and other charges. *Id.* at 6. Petitioner's nonjudicial punishment included 45 days of restriction, 45 days of extra duty, forfeiture of one half of his pay for two months, and a reduction in grade. *Ibid.*

Petitioner was processed for an administrative discharge. Pet. App. 6. When the GCMCA received the discharge proceedings paperwork, he refused to approve the discharge and referred petitioner's case to a general court-martial. *Ibid.*

By the time of trial, petitioner and the victim had been restationed to other locations. Pet. App. 20. The court-martial was held at Pensacola, Florida. *Ibid.* The military judge, counsel, and potential jury members were from Pensacola. *Ibid.* Petitioner objected to a trial at that location on the ground that the Sixth Amendment required a trial in the district where the offense occurred. *Ibid.* The military judge overruled the objection. *Id.* at 20-21. Petitioner also unsuccessfully moved to dismiss the charges on the ground that the CPO had granted him immunity. *Id.* at 22.

3. The NMCCA affirmed. Pet. App. 18-28. The NMCCA rejected petitioner's contention that the Sixth

Amendment required the trial to be held in San Antonio, Texas. *Id.* at 20-21. The NMCCA explained that the Sixth Amendment requirement that the crime must be tried in the place where the crime occurred does not apply to military tribunals. *Id.* at 21.

The NMCCA also rejected petitioner's equitable immunity claim. Pet. App. 22-25. The NMCCA reasoned that petitioner had failed to show detrimental reliance on the CPO's unauthorized promise of immunity. *Id.* at 24-25.

4. After granting review on the immunity issue only, Pet. App. 2, the CAAF affirmed. *Id.* at 1-17. The court held that while only the GCMCA has authority to grant immunity, a court may nonetheless grant relief if an unauthorized promise of immunity was made, the accused reasonably believed that the promise was made by a person with authority to do so, and the accused relied on the promise to his detriment. *Id.* at 3-4. The court further held that a bar to prosecution is appropriate only when the accused can show that other steps are inadequate to remedy any detrimental reliance. *Id.* at 4, 7.

Applying those principles, the CAAF assumed that the CPO made the immunity grant with the approval of a special-court martial convening authority and that petitioner reasonably relied on the CPO's grant. Pet. App. 7. The CAAF ruled, however, that petitioner had failed to demonstrate detrimental reliance on the CPO's unauthorized promise. *Id.* at 8. The CAAF explained that the military judge excluded from the court-martial proceeding statements petitioner made during the NJP proceeding, the government did not use any information relating to petitioner's administrative separation against him at the court-martial, and the government agreed that petitioner would be entitled to full sentencing credit

for the punishment that petitioner received at the NJP proceeding. *Id.* at 6-7. The court added that the government had independent evidence of petitioner's crimes before petitioner entered into discussions with the CPO, and that petitioner had not identified any significant statement made during the NJP proceeding or in the administrative discharge packet that would not have been presented to the GCMCA in the absence of the CPO's promise. *Id.* at 7-8.

Judge Erdmann dissented. Pet. App. 8-17. He concluded that detrimental reliance is not an element of a de facto immunity claim and that the government should therefore have been barred from bringing court-martial charges against petitioner. *Id.* at 8-9.

## ARGUMENT

1. Petitioner contends (Pet. 2-7) that trying him in Florida for a military offense that occurred in Texas violated the Sixth Amendment's requirement that criminal prosecutions must be tried in the place where the crime was committed. The Court lacks jurisdiction over that claim. In any event, that contention is without merit and does not warrant review.

This Court's authority to review decisions of the CAAF is derived from 28 U.S.C. 1259. Under Section 1259(3), the Court may review cases, such as this one, in which the CAAF has granted a petition for review under 10 U.S.C. 867(a)(3). That authority to review CAAF decisions, however, is expressly qualified by 10 U.S.C. 867a(a), which provides that this Court "may not review by a writ of certiorari under [28 U.S.C. 1259] any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review."

That limitation on review is applicable here. While the CAAF granted a petition for review on petitioner's claim that he was entitled to transactional immunity, it refused to grant a petition to review his Sixth Amendment claim. Under the terms of Section 867a(a), the Court may not review the CAAF's action in refusing to grant review of that claim.

In any event, there is no merit to petitioner's Sixth Amendment claim. In *Ex parte Quirin*, 317 U.S. 1, 39 (1942), the Court made clear that the Sixth Amendment, including the requirement that criminal prosecutions must be brought in the place where the crime occurred, does not apply to proceedings in military tribunals. Consistent with *Quirin*, the CAAF (then the Court of Military Appeals) has held that court martial proceedings are not subject to the Sixth Amendment's requirement that a criminal prosecution must be held in the place where the crime occurred. *Chenoweth* v. *Van Arsdall*, 46 C.M.R. 183, 186 (C.M.A. 1973).

This case illustrates why applying the Sixth Amendment place-of-prosecution requirement to court-martial proceedings would interfere with the functioning of the military without a sufficient countervailing benefit. By the time of trial, neither petitioner nor the victim was stationed in Texas, and many of the witnesses had been transferred from Texas to other parts of the world. Pet. App. 20. Furthermore, the military judge, counsel, and potential members were from Pensacola, Florida, the site of the trial. *Ibid.* And petitioner conceded that he was not aware of any problem in holding the trial in that location. *Ibid.*

Petitioner errs in contending (Pet. 2-3) that *Chenoweth* conflicts with the decisions of federal courts of appeals. The cases petitioner cites hold only that the

Sixth Amendment requires federal criminal prosecutions to be tried in the place where the crime occurred. None of those cases addresses whether court-martials in military tribunals are subject to that Sixth Amendment requirement. There is therefore no conflict between *Chenoweth* and the court of appeals decisions cited by petitioner. Thus, even if the Court had jurisdiction to review petitioner's Sixth Amendment claim, review of that question would not be warranted.

2. Petitioner also contends (Pet. 6-16) that his court-martial was barred by his prior immunity agreement. That contention is without merit and does not warrant review.

Under C.M.R. 704(c), only a GCMCA can grant immunity, and he cannot delegate that authority to another person. Consistent with that limitation, a promise of transactional immunity to a military defendant made by anyone other than a GCMCA is not a bar to prosecution. See *United States* v. *Churnovic*, 22 M.J. 401, 404-405 (C.M.A. 1986). Here the GCMCA did not promise petitioner transactional immunity. Rather, petitioner reached his agreement with the CPO. Pet. App. 5. Because the CPO had no authority to offer petitioner immunity, petitioner did not obtain a valid immunity agreement.

Despite the CPO's clear lack of authority to conclude an immunity agreement with petitioner, the CAAF examined whether petitioner had detrimentally relied on the CPO's actions, and, if so, whether barring a prosecution would be an appropriate remedy. Pet. App. 6-8. After a thorough examination of the circumstances, the CAAF concluded that no such detrimental reliance occurred. *Id.* at 7-8. As the CAAF explained, petitioner had already admitted his culpability before having any

discussion with the CPO, and nothing he said after he reached an agreement with the CPO was used in subsequent proceedings against him. *Ibid.*

Petitioner does not challenge the CAAF's determination that he did not rely to his detriment on the CPO's actions. Rather he contends (Pet. 7-8) that review is warranted because the CAAF's reliance on the absence of detrimental reliance conflicts with the Eleventh Circuit's decision in *Rowe* v. *Griffin*, 676 F.2d 524, 528 (1982). There is, however, no conflict.

In *Rowe*, the court of appeals held that a promise of transactional immunity should be enforced when: (1) such an agreement has been made; (2) the defendant has performed his side of the agreement; and (3) the subsequent prosecution directly relates to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government. Applying that standard, the court held that the State was required to honor a transactional immunity agreement it had made with the defendant. Of crucial importance, however, the state official who made the agreement was the State's Attorney General, and he had state-law authority to promise transactional immunity, at least for the duration of his office. In those circumstances, the court concluded that the agreement should be enforced notwithstanding the Attorney General's claim that the agreement was limited by state law to the duration of his office. 676 F.2d at 526 n.4.

The circumstances here are dramatically different. Here, petitioner reached an agreement with a subordinate official who had no authority of any kind to promise immunity. *Rowe* had no occasion to address whether an agreement should be enforced in such circumstances.

There is therefore no conflict between *Rowe* and the decision below.

The other court of appeals decisions cited by petitioner provide even less support for his position. In *United States* v. *McHan*, 101 F.3d 1027 (1996), cert. denied, 520 U.S. 1281 (1997), the Fourth Circuit held that an Assistant United States Attorney had not reached an agreement with the defendant not to prosecute him. That case therefore did not present the question whether a court should enforce an agreement not to prosecute made by a lower-level government official who clearly lacked authority to make the agreement.

In *United States* v. *Liranzo*, 944 F.2d 73 (1991), the Second Circuit held only that the government had not breached an agreement to refrain from introducing statements the defendant had made in discussions with the government. That case did not involve a claim of transactional immunity, much less a claim that a court should enforce an offer of transactional immunity made by a government official who clearly lacked authority to make such an offer.

The cases cited by petitioner are also inapposite for another important reason. None of them involved the military justice system. The military criminal justice system "exists separate and apart" from the federal criminal system. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). Military courts do not have to follow every rule or procedure that exists in the federal criminal justice system, but can modify them to meet military needs. The CPO's lack of authority is, by itself, sufficient to reject a claim that his actions conferred immunity. Pet. App. 7. But to the extent that any further inquiry is made based on apparent authority, the military's "detrimental reliance" rule strikes an appropriate balance

between the needs of the military and the rights of a military accused because it ensures that no defendant will receive a windfall from a grant of immunity by a person unauthorized to grant immunity.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2006

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FILED
OCT 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 06-58

IN THE

# Supreme Court of the United States

JOSHUA R. MCKEEL
*Petitioner*

v.

THE UNITED STATES
*Respondent*

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Armed Forces

## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## BASIS FOR JURISDICTION

As indicated in the opposition, 28 U.S.C. § 1259 is a legitimate basis for jurisdiction for this court. The government concedes that this Court has jurisdiction

## ARGUMENT IN REPLY

I The Convening Authority and the Military Judge Violated the Vicinage Provisions of the Sixth Amendment to the United States Constitution in Allowing the Court-Martial to Proceed in the Northern District of Florida When the Alleged Activity Occurred in the Western District of Texas

Surprisingly, the United States argues that this issue is not properly before the court due to the provisions of 10 U.S.C. § 867a which reads in pertinent part:

> Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.[1]

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[1] The jurisdiction was of this Court was initially invoked under 28 U.S.C. § 1254. Without waiver of the propriety of that invocation, petitioner will argue, for purposes of this reply brief, the impact of jurisdiction under 28 U.S.C. § 1259.

In taking the position that the Supreme Court has jurisdiction to review only those issues for which a petition for review was granted by the Court of Appeals for the Armed Forces, the Solicitor General has strengthened the argument for granting certiorari. As discussed herein, such a position is contrary to the plain meaning of the statute and the legislative history. This appears to be a new position for the Solicitor General but it concerns an issue that ean and will reoccur since the Court of Appeals for the Armed Forces routinely grants petitions for review for some but not all of the issues raised before it. This is an important point of law that requires early resolution so that future practitioners and the Court of Appeals for the Armed Forces itself will understand and comply with the Court's stance on this matter. Early resolution will also give the Congress the opportunity to provide clarification if they deem it necessary.

Under 10 U.S.C. § 867a, The Court of Appeals of the Armed Forces arguably acts as an initial gatekeeper for the Supreme Court by effectively making a preliminary assessment as to what cases are worthy of certiorari. The statute forbids Supreme Court review of the refusal to grant a petition for review. It does not specify that issues not reviewed by the Court of Appeals for the Armed Forces cannot be reviewed by the Supreme Court of the United States, once a review is granted on any basis. In other words, once the Court of Appeals for the Armed Forces grants a petition for review of one issue, the door is opened, for certiorari purposes, for Supreme Court review of all issues raised below.

While the statute inexorably makes the Court of Appeals for the Armed Forces the court of last resort when a petition for review has been granted, it does not limit this Court's jurisdiction when a petition for review has been

granted on some but not all issues.

The appropriate starting point when interpreting any statute is its plain meaning. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Words must also be given their plain meaning. In the instant case the statute denies a right of review any "action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review."

Here the Court of Appeals for the Armed Forces has not refused to grant a petition for review. A petition for review was granted and litigated by briefs and at oral argument. The court rendered a decision and produced a well reasoned dissent. Consequently, issues first raised in the petition for review, are eligible to be considered for certiorari.

The legislative history also supports the plain meaning of the statute. Certiorari jurisdiction was codified as part of the Military Justice Act of 1983. The House Report notes that only cases where the court declined to grant a petition for review would be excluded from consideration for certiorari. H.R. Rep 98-549, 1983 U.S.C.C.A.N. 2177, 2182. Then Secretary of Defense Caspar Weinberger echoed that proposition in his letter to the Committee Chair. *Id.* At 2185.

Eugene Fidell, the current President of the National Institute of Military Justice, testified before Congress in support of the Military Justice Act of 1983. Fidell recently

noted that the intent of Congress was always to allow the litigation of all issues brought before the Court of Appeals for the Armed Forces, once a petition for review had been granted on any one issue. Fidell, Eugene R. and Dwight H. Sullivan, EVOLVING MILITARY JUSTICE, Naval Institute Press, (Annapolis 2002) pp. 150-151. In support of this position, Fidell reviewed and analyzed the legislative history of the 1983 Act and it predecessor legislation. *Id.* at n. 12-14.

The Solicitor General's position on jurisdiction is completely without merit. Failing to grant certiorari in this case, however, might be construed as a signal that the Solicitor General's position is correct. Consequently, the Court should consider granting certiorari to more fully address the Solicitor General's position.

Additionally, this issue is of Constitutional import. Members of the military service do not leave their Constitutional rights as American citizens at the military processing center. While occasionally the needs of the military may require some curtailment of Constitutional guarantees, that should be the exception and not the rule. Only when the contingencies of military service require it, should the rights of a servicemember be limited - and then only to the extent that is absolutely necessary.

In their opposition the Solicitor General tries to distinguish between the instant case and the normal civilian criminal proceeding. There is no real difference. There were no military contingencies or exigencies that mandated holding the trial in Florida instead of Texas. Instead, this was a garden variety "date rape" trial.

The Solicitor General argued unpersuasively that the

petitioner was not prejudiced. Indeed he was. He was denied the ability to have members review the crime scene. Additionally, while some witnesses had moved from Texas others had not. There were suitable facilities available to hold the trial in Texas. It was held in Florida not for military concerns but for convenience.

The military is increasingly tending to ignore this rule, which has resulted in some disturbing consequences. Various courts-martial such as the prisoner abuse trials and alleged murder/rape controversies against Iraqi nationals are being held in the United States, thousands of miles away from the crime scenes. Defense attorneys and investigators are provided only a limited amount of time in country to inspect the scene and to develop witnesses. They are unable to follow up leads generated by trial testimony because the are located far from the scene. While transferring a case to the United States might be necessary in light of a strong military exigency, such as the crime location being occupied a hostile force, the routine transfer from the vicinage of the crime should not be allowed.

*Chenowith v. Van Arsdall,* 46 C.M.R. 183, 22 USCMA 183 (1973) is a case in point. In that case, the deployment of the *U.S.S. Ranger* to the Western Pacific in support of combat operations in Vietnam was arguably an operational contingency that could required shifting the trial. More important, the vicinage was not really shifted. The scene of the crime was the ship itself and all relevant witnesses were located aboard the ship. Shifting the situs from San Francisco to the ship actually supported that accused's Sixth Amendment right.

At a minimum, prior to moving a trial from the vicinage, a Military Judge should be required to make a

specific finding that the action actually supports the accused's Sixth Amendment right, or that military exigencies prevent the trial from being held near the location of the alleged crime. Mere convenience is not a suitable reason.

Nor does the Solicitor General's argument that the vicinage requirement was exempted from courts-martial by *Ex Parte Quirin*, 317 U.S. 1 (1942) have any merit. *Quirin* dealt with military commissions. As a threshold matter, the array of rights allowed at courts-martial has always been more generous than at a military commission. As this Court recognized, there are significant differences between the two. *Hamdan v. Rumsfield*, ___ U.S. ____, 126 S.Ct. 2749 (2006). Additionally, *Quirin* was decided before the enactment of the Uniform Code of Military Justice. Art. 36(a) of the Code (10 U.S.C. § 836(a)) reads as follows:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Here Congress has decreed that the coruts-martial procedures shall conform, when practicable, to the federal district court criminal trial procedures. Absent any intention to the contrary, this would include the vicinage practice as well. This statute presents a Congressional dictate not

present when *Quirin* was decided.

Since this question is capable of recurrence, and in fact is reoccurring often, this Court should grant certiorari to consider this issue.

II The Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution in Not Dismissing the Charge and Specification When the Petitioner Relied to His Detriment on a Pre-Trial Agreement

In their opposition, the Solicitor General fails to address the issues of apparent authority raised in the court below and in the petition of certiorari. R.C.M. 704(c) Discussion. The apparent authority concept allows for an effective grant of immunity by someone other than the General Courts-Martial convening authority. Here a Legalman Chief Petty Officer, who was the command's legal officer, and the Special Court-Martial convening authority, ratified the agreement. Similar actions have been held to effectuate a grant of immunity in military law. *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986); *United States v. Kimble*, 33 M.J. 284 (CMA 1991). The Solicitor General did not address the holdings of *Kimble*. Although they mentioned *Churnovic*, they did not confront the apparent authority issue or consider Judge Erdman's thoughtful analysis of the concept *United States v. McKeel*, 63 M.J. 81, 86-87 (2006)(*Erdman, J. dissenting*).

Instead, the Solicitor General concentrated on differences between the instant case and *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982). Here the Solicitor General found it crucial that the immunity was offered by the Attorney General. Frankly the offeror is irrelevant. The argument

displays a lack of knowledge of the difference between civilian and military law and ignores the role of the convening authority. Additionally it does not recognize the role of a Chief Petty Officer and the Commanding Officer in the operation of the Navy - especially in the eyes of an unsophisticated E-2. What is relevant is that *Rowe* did not require "detrimental reliance" as an element of de facto or equitable immunity. The court below stands alone among federal appellate courts that have interjected this element. The same holds true for other cases cited in the petition. The Solicitor General ignored this issue.

As discussed *supra*, there are obviously some differences between the military and civilian criminal system. These differences should be minimized and only apply when civilian safeguards are not practicable. The Constitution requires no less. Congress, through the enactment of 10 U.S.C. § 836, has echoed that fundamental standard. Accordingly, certiorari should be granted on this issue to resolve the differences between the Circuits and to clarify this important point of law.

## CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Armed Forces.

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